Filed 3/4/09 P. v. Davila CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUBEN T. DAVILA, Defendant and Appellant.	B203618 (Los Angeles County Super. Ct. No. KA077756)
THE PEOPLE, Plaintiff and Respondent, v. LUDWIG OSWALDO JUAREZ, Defendant and Appellant.	B204579 (Los Angeles County Super. Ct. No. KA077874)

APPEALS from judgments of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant Ruben T. Davila.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant Ludwig Oswaldo Juarez.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Ruben T. Davila (Davila) was convicted of first degree murder for the January 6, 2007, gang beating and fatal stabbing of David Galindo, Jr. (Galindo). Another case was consolidated into the murder case for a joint jury trial. In that case, Davila and appellant Ludwig Oswaldo Juarez (Juarez) were convicted of a January 15, 2007, discharge of a firearm from a motor vehicle and other offenses arising from Davila having discharged a firearm at a 30-year-old man who was taking out his trash.

THE CONVICTIONS

A jury convicted Davila of first degree murder with the use of a deadly or dangerous weapon, a knife (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1); count 5),[1] assault with a firearm (§ 245, subd. (a)(2); count 1), discharging a firearm at another person from a motor vehicle (§ 12034, subd. (c); count 2), and being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1); count 3). The jury found that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(B).) In bifurcated proceedings, the trial court found that Davila had a prior serious felony conviction that required a five-year enhancement and sentencing pursuant to the "three strikes" law (§§ 667, 1170.12) and that he had served a separate prison term for a felony (§ 667.5, subd. (b)).

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

The same jury convicted Juarez of assault with a firearm (§ 245, subd. (a)(2); count 1), discharging a firearm at another person from a motor vehicle (§ 12034, subd. (c); count 2), and knowingly permitting another person to discharge a firearm from a motor vehicle (§ 12034, subd. (b); count 4). The jury found that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(B).) Juarez admitted that he had served two separate prison terms for a felony. (§ 667.5, subd. (b).)

SENTENCING

For Davila, the trial court imposed an aggregate term of 78 years 4 months to life in state prison, as follows. For the principal term, the count 2 discharge of a firearm at another person from a motor vehicle, the trial court imposed a doubled middle term of five years, or 10 years, enhanced by a five-year term for the gang allegation and by a five-year term for the prior serious felony conviction. For count 3, being an ex-felon in possession of a firearm, the trial court imposed a consecutive term of one-third of the doubled middle term of two years, or 16 months. For the first degree murder in count 5, the trial court imposed a consecutive doubled indeterminate term of 25 years to life, or 50 years to life, enhanced by a one-year term for the use of a knife, a consecutive five-year term for the prior serious felony conviction, and a consecutive one-year term as Davila had served a separate prison term for a felony.

For Juarez, the trial court imposed an aggregate determinate term of 14 years, consisting of an upper term of seven years for the count 2 shooting from a motor vehicle that was enhanced by a five-year term for the gang allegation and by two consecutive one-year enhancements for having served two separate prison terms for a felony. The other terms imposed were ordered stayed pursuant to section 654.[2]

---

[2] The court ordered the record augmented with the oral proceedings of sentencing as it concerns Juarez. (Cal. Rules of Court, rules 8.155 & 8.340 (b)(1).)

THE CONTENTIONS

Davila and Juarez appealed from the judgments, and we ordered the appeals consolidated into the above-numbered case.

Davila contends that: (1) the identification procedure was unduly suggestive; (2) there was a *Brady* violation because the prosecutor only belatedly disclosed that he would be making informal use immunity offers to two witnesses (*Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*)); and (3) with respect to the murder in count 5, the trial court improperly refused to give requested jury instructions concerning voluntary intoxication.

Juarez contends: (1) the identification procedure was unduly suggestive, and tainted in-court identifications should have been suppressed; and, (2) the evidence was insufficient to support the finding of the gang enhancement.

FACTS

I. The Prosecution's Case-in-chief

A. The January 6, 2007, Murder (Count 5)

1. The Murder

On January 6, 2007, El Monte Flores (Flores) gang member Davila smoked methamphetamine with two unaffiliated brothers, Michael V. (Michael) and Henry V. (Henry). The youths were in a motel room the brothers had rented on the second floor of the Top 10 Motel in El Monte. The motel is located just south of the 60 Freeway on Peck Road across the street from a gas station that was full of patrons. With Davila was a companion youth who was also a Flores gang member.

At some point after dark, and after 20 minutes of smoking methamphetamine, Michael, Davila, Davila's companion, and perhaps several other persons chased Galindo out of the motel and into the middle of the street. There, they beat him and kicked him until he lay on the ground motionless. Suddenly, Davila removed from his clothing a four-to-five-inch knife. He bent over Galindo, and repeatedly stabbed him in the head, chest, abdomen, and arm. While stabbing Galindo, Davila repeatedly yelled out his gang's name, "Flores," and spat on Galindo.

Davila and his Flores gang companion ran to the motel. Michael and Henry jogged into the gas station and left the scene in a car driven by Rene A. and occupied by Arthur A., a friend of their father. Rene A. and Arthur A. drove Michael and Henry to a park near the youths' home. At trial, Michael claimed to have participated in the beating only because he was intimidated by Davila and by Davila's large size. Michael claimed that he had kicked Galindo only once during the melee. His brother Henry claimed that during the beating and stabbing, he was a mere bystander.

At trial, Michael and Henry were granted informal use immunity and testified to the events of the beating and the stabbing. They identified Davila as the assailant wielding the knife. One bystander in the gas station described the assailant with the knife as being older and larger than the other persons who had participated in the beating. The bystander's description of the youth with the knife was consistent with Davila's physical appearance.

2. The Gang Testimony

El Monte Detective Ralph Batres, a veteran gang detective, testified to the background of the Flores gang and that the Flores gang dominated the gang scene in El Monte. The detective said that Davila was an admitted Flores gang member and that Davila had many "EMF" tattoos on his head and neck, which were the tattoos worn by Flores gang members. Detective Batres testified to the factual foundation necessary to prove a gang enhancement: (1) that the Flores gang was a "criminal street gang," and (2) that the gang engaged in a "pattern of criminal activity." (§ 186.22. subds. (e) & (f).)

Based on a hypothetical conforming to the facts of the case, the detective gave his opinion that the murder benefited the Flores gang and that the brutal stabbing would have enhanced Davila's individual reputation within the gang. The detective explained that every gang member wants to be known as the most violent and most feared person; that is how one earns respect in that culture. Committing violent acts enhances one's status within the gang. The gang is enhanced by the commission of vicious acts such as a stabbing as these acts create an atmosphere of fear and intimidation within the entire

community; after a stabbing, all everyone in the community is talking about is the gang. Killing someone "out on the street" in a gang area is "putting in work" for the gang.

B. The January 15, 2007, Shooting (Counts 1, 2, 3 & 4)

1. The Assault with a Firearm

At about 7:30 or 7:45 a.m. on the morning of January 15, 2007, Ruben S. (Ruben), a 30-year-old small business owner, was taking his family's Christmas tree out to the curb. Ruben had no gang affiliation. He lived in a residential neighborhood claimed by the Bassett gang. When Ruben was at the curb disposing of the tree, a silver Nissan slowly drove by. Ruben had eye contact with the driver and saw another youth in its passenger seat. The youths were wearing black beanies. Ruben felt uncomfortable and walked back to his gate, which was about 15 feet from the curb. The Nissan made a sudden U-turn and pulled up onto the lip of his driveway.

Ruben saw the passenger stick his head out of the Nissan's window. The passenger yelled out, "Hey, ese." Ruben said nothing and turned and looked at the passenger for just a second as he did not want to be confrontational. The passenger repeated, "Hey, ese," and then the passenger said, "Hey, ese. Where you from?" As the passenger spoke, Ruben could see the passenger was pointing a small handgun at him out of the Nissan's window. Ruben saw a muzzle flash, and Ruben dove to the ground. Four shots rang out, two of which left marks on his garage door and gate.

The Nissan drove off. Ruben telephoned the police, who responded immediately. Los Angeles County Deputy Sheriff James Bickel broadcast a general description of the assailants: two male Hispanics in their 20's wearing black beanies who were driving a silver-colored Nissan. According to the deputy, Ruben told him that he could probably identify the gunman, but not the driver. Ruben recalled telling the deputy that the gunman was in his late 20's; he was not "a young kid."

At trial, Ruben testified that the gunman was wearing a jacket and gloves. Both of the youths in the Nissan had round faces.

2. Juarez's and Davila's Apprehension

A motorcycle officer for the Baldwin Police Department had seen the Nissan with the two male occupants shortly before the shooting. Shortly after the shooting, the officer heard the broadcast concerning the shooting. He then saw the two youths again in the same Nissan. This time, the youths were with two female companions. When the Nissan's driver saw the officer, the Nissan's driver careened out of a gas station and led the officer on a high speed chase. The officer lost the Nissan during the pursuit. Then, deputy sheriffs from Industry Station, who had been alerted to the Nissan's presence by the officer, found the Nissan in a West Valinda residential area. It was unlocked and abandoned; a black beanie and a glove were found inside the abandoned Nissan.

Shortly thereafter, at two different locations, several streets away from the abandoned Nissan, deputy sheriffs detained Davila and then Juarez. Davila was apprehended wearing a black jacket. In his pockets, he had a black knit cap and a pair of gloves. A loaded nine-millimeter handgun was recovered inside a trash can at the location behind a wall where Davila had hidden when he was detained by the deputy. When Juarez was discovered, he ran. At apprehension, he had in his possession one black knit glove.

Ruben was transported to the detention scenes. He identified the Nissan as the assault vehicle. One at a time, during infield identification procedures, he was shown three persons. He tentatively identified Juarez and Davila from their faces, but said that he was a little unsure because the men were not wearing beanies and black gloves and he previously had seen only the youths' heads and shoulders. The following day, Detective Guerrero came by Ruben's business with two six-pack displays, each of which was duplicated so that the detective had four six-pack photographic displays in all. The duplicate displays contained photographs of Juarez and Davila and the other subjects with digitally-altered black beanies superimposed on their heads. The detective gave Ruben an identification admonition and showed him the displays.

Immediately upon viewing the displays, Ruben was certain that Juarez was the driver and that Davila was the passenger-gunman. At trial, Ruben testified that he was "a

hundred percent" certain of his identifications after seeing the "head shot[s]" presented to him in the displays and upon seeing the men depicted in beanies. At the preliminary hearing and at trial, Ruben identified Juarez and Davila as his assailants.

3. The Gang Testimony

Detective Guerrero, an Industry gang detective, was familiar with the Puente gang, of which Juarez was an admitted member. The detective testified to the foundational facts for a gang enhancement for the shooting in that the Puente gang was a "criminal street gang" that engaged in a "pattern of criminal activity." (§ 186.22, subds. (e) & (f).)

In response to a hypothetical based on the facts of the shooting, the detective gave his opinion that the charged offenses were committed for the benefit of the Puente and Flores gangs, as well as to enhance the individual gang reputations of Juarez and Davila. The detective explained the basis for his opinion. He said that he believed that the persons described in the hypothetical were acting to gain respect, which would benefit their gangs as they were "putting in work." Also, they were earning respect from each other and from other members of their respective gangs. He said that the gang members involved were showing one another and their gangs that they were "down for whatever was going on." The detective testified that committing such crimes intimidated the communities in which the gang operated. He indicated that one of the Puente gang's primary criminal activities was assaulting the gang members who belonged to the rival Bassett gang, which claimed a contiguous gang territory. They also committed violence on ordinary citizens.

Detective Guerrero was asked whether it was unusual for the members of two different gangs to commit a gang shooting together against a rival, and the detective replied that it was. The detective explained that he understood that Juarez and Davila had relationship through the women in Juarez's car. Also, although the Flores and Puente gangs were formerly rivals, the Flores and the Puente gangs were now living and associating together in a portion of Puente's territory. Currently, the deputies were hearing that the Puente gang was "picking up alliances [with other rivals to the Bassett gang for the purpose of] attack[ing] Bassett."

II. The Defense

In defense, Juarez and Davila declined to testify.

Davila presented an alibi for Galindo's murder. Davila's stepdaughter testified that she had a family party on the night of January 6, 2007. Davila and the stepdaughter's mother, Suzette Davila (Suzette), attended. At about 11:00 to 11:30 p.m., the stepdaughter had driven her mother and stepfather to the Top 10 Motel where they were staying in a rented room on the first floor. Suzette corroborated her daughter's claim. Suzette testified that Davila stayed with her in the motel room for the remainder of the night. She claimed to have been unaware of the melee or the murder until she and Davila heard the sirens as the paramedics arrived.[3]

Davila called a bystander who was in the gas station that night to the witness stand. The bystander agreed that she had told the police on the night of the murder that the assailant with the knife may have been one of the men who ran to a car in the gas station and drove off.

DISCUSSION

I. Unduly Suggestive Identification Procedures

Appellants contend that the identification procedures were unduly suggestive and unreliable and that the identification evidence adduced at trial should be suppressed as it was tainted by the earlier identification procedures.

The contentions lack merit.

A. Background

1. Juarez's Motion

Prior to trial, Juarez moved to suppress Ruben's identification of him as the driver on grounds that the six-pack photographic display was unduly suggestive on its face.

Juarez's trial counsel pointed out that all the persons but Juarez in the six-pack photographic display were posed the same way; it appeared that their photographs were standard booking photographs. However, Juarez was posed differently in his photograph.

---

[3] Suzette testified that Davila was working nights.

Also, Juarez's eyes were not entirely open. The result was that Juarez looked as if he had a rather demonic expression on his face. Four of the men in the display had "pointy chin[s]," in contrast with Juarez's photograph and that of another person—subject No. 6—who had rounder faces. Trial counsel argued that Juarez photograph "jump[ed] out" at the viewer.

The parties agreed for the purpose of the pretrial motion that Ruben had had about 60 seconds to see the assailants during the shooting. Also, during the initial report to Deputy Bickel, Ruben was unable to give more than a general description of the driver. Ruben described the Nissan's driver (Juarez) as a male Hispanic in his 20's.

The trial court denied the motion. It commented that all the individuals in the display had a relatively uniform appearance: they had close-cropped or almost-shaved heads, they had various sized mustaches, and they were Hispanic. No one had any unique facial features. Also, the trial court discounted the defense claim that Juarez's photograph made him look evil or demonic. It said that when photographed, Juarez was merely squinting. The trial court ascertained from the prosecution that displays had been prepared by means of a law enforcement computer program designed for that purpose. The trial court concluded that the display was "reasonable," a "fair presentation," and not "unfair."

2. Davila's Motion

Davila's trial counsel complained that Davila's display was unduly suggestive on its face in that Davila was depicted shirtless and he had a very large "EMF" gang tattoo on his neck that was highly visible. Trial counsel asserted that Davila also had facial tattoos over his left eye, under his lip, and on each ear and argued that these tattoos were visible in his photograph in the display. Trial counsel asserted that the lineup was unfair because the tattoos just "r[u]ng out" "identify me." He suggested that the display should have contained other persons with tattoos, or the detective should have masked Davila's large neck tattoo. He pointed out that apart from Davila, only one other subject in the display was depicted without a shirt.

Trial counsel mentioned that Ruben had described the gunman to Deputy Bickel as a male Hispanic, in his 20's, with black hair and brown eyes, and he was wearing a black beanie. Trial counsel said that in giving Deputy Bickel a description of the gunman, Ruben had failed to mention anything about tattoos.

The trial court ruled that Davila's display was not unduly suggestive. It explained that if anything, the presence of the tattoos on Davila's neck would have tended to exclude him as the gunman based on the description given to the deputy. It commented that the youths depicted in the display appeared to have the same general facial characteristics as Davila.

At trial, during cross-examination, Ruben admitted that during the shooting, Davila's mustache and tattoos did not stand out as he viewed the photograph. Ruben did not recall telling Deputy Bickel that he would be able to identify only the gunman-passenger (Davila), and not the driver (Juarez).

B. The Relevant Legal Authority

"Whether an extrajudicial identification admitted at trial is so unreliable as to violate a criminal defendant's right to due process of law under the Fourteenth Amendment is governed by principles stated in *Manson v. Brathwaite* (1977) 432 U.S. 98. Those principles—although variously phrased in various state and federal decisions—establish the following structure of analysis. [¶] The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable. [Citation.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, questioned on other grounds in *People*

v. Edwards (1991) 54 Cal.3d 787, 834–835; accord *People v. Cook* (2007) 40 Cal.4th 1334, 1354–1356 (*Cook*); *People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

The defendant has the burden of showing that the identification procedure was unduly suggestive and unfair as a demonstrable reality, not just as a matter of speculation. (*Cook, supra,* 40 Cal.4th at p. 1355.) The question is whether anything caused defendant to stand out from the others in a way that would suggest the witness should select him. (*Ibid*.) "A due process violation occurs only if the identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' (*Simmons v. United States* (1968) 390 U.S. 377, 384.)" (*Cook, supra*, at p. 1355.)

Our review is de novo. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608–609.)

C. The Analysis

1. Juarez's Contention

Juarez's argument on appeal is different than the one he raised in the trial court. On appeal, he argues that Ruben told Deputy Bickel after the shooting that he would be unable to identify the Nissan's driver, and Ruben made no identification of Juarez at the field showup. But, suddenly, on the day following the shooting, when Ruben was shown the digitally-altered photograph of Juarez wearing a beanie, Ruben identified Juarez as the Nissan's driver. Ruben had not previously mentioned that the driver was also wearing a beanie. This specific issue was not raised in the trial court. Consequently, it is not cognizable on appeal. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989; *People v. Medina* (1995) 11 Cal.4th 694, 753.)

We nevertheless address the contention on its merits.

Juarez's contention is flawed because it is predicated on a scenario lacking support in the record. Despite Ruben's claim to Deputy Bickel that he might have difficulty identifying the driver, during the infield identification procedures, Ruben recognized both Juarez and Davila. Ruben did not want to tell the deputies that he was certain of his identifications in the circumstances of the infield showup. Ruben felt that his perspective was different than when he saw the youths during the shooting. He explained that during

the infield displays, he saw the youths' full bodies, not just their heads. Also, the assailants wore beanies during the shooting.

Apparently, he voiced his hesitation to the deputies. The following day, Detective Guerrero arrived at Ruben's business with photographic displays addressing Ruben's concerns. The six-pack photographic displays contained photographs of only the heads and shoulders of the youths depicted. All the youths depicted in the duplicate displays had digitally-imposed beanies superimposed over the tops of their heads. Ruben testified that as soon as he saw these digitally-altered displays, he was positive that his tentative identifications in the field were accurate.

At trial, Ruben was never asked by trial counsel about whether he was making his identification based on the events of the shooting or the subsequent infield identification procedures. Ruben testified that he recognized the men at the infield showups from their round faces, which established that his identifications were based on his observations during the shooting. Also, Detective Guerrero gave Ruben an identification admonition prior to showing him the four six-pack photographic displays. Presumably, the deputies also gave Ruben a similar identification admonition prior to the infield showups, although again, there was also no trial inquiry on this point.

A single person showup in the field is not inherently unfair. (*People v. Ochoa* (1993) 19 Cal.4th 353, 413 (*Ochoa*).) There was nothing improper in conducting two separate field show-ups and then responding to the eyewitness's requests to provide the eyewitnesses with a different view of the suspects so that he could make a more accurate determination of identity. (*Id.* at p. 413.) Nor do successive displays of photographs necessarily lead to a conclusion that the identification procedures are automatically impermissibly suggestive. (*People v. Yeoman* (2003) 31 Cal.4th 93, 124.) Victims frequently identify criminal suspects in several procedures before and during trial.

We have independently reviewed the record and examined the four six-pack photographic displays shown to Ruben by Detective Guerrero.[4] The trial court's ruling on the motion to suppress is supported by the record. The subsequent photographic identifications and the preliminary hearing and trial identification testimony were untainted by any prior improper identification procedure. (*People v. Bethea* (1971) 18 Cal.App.3d 930, 937–938; see also *People v. Boyer* (2006) 38 Cal.4th 412, 478–479 & fn. 54.)

2. Davila's Contention

a. The Proper Standard of Review

We use the same standard to evaluate state and federal constitutional claims based on an unduly suggestive identification procedure. (See, e.g., *Ochoa, supra*, 19 Cal.4th at pp. 411–412 [the court used the same standard to determine the defendant's state and federal due process claims made concerning an unduly suggestive identification procedure].) In citing the decisions in *People v. Caruso* (1968) 68 Cal.2d 183, 184–191, and *People v. Martin* (1970) 2 Cal.3d 822, 830, Davila suggests that he confuses the *Wade-Gilbert* rule, which requires the presence of counsel at a post-accusatory lineup and formerly required a "per se" reversal in the event of a violation, with a due process claim based on an unduly suggestive identification. (Compare *United States v. Wade* (1967) 388 U.S. 218 (*Wade*) & *Gilbert v. California* (1967) 388 U.S. 263 (*Gilbert*) with *Stovall v. Denno* (1967) 388 U.S. 293, 296–301, overruled on other grounds in *Griffith v. Kentucky* (1987) 479 U.S. 314 & *People v. Bisogni* (1971) 4 Cal.3d 582, 585–586; see *Cook, supra*, 40 Cal.4th at pp. 1353–1354.) The legal principles that apply to a claim of a denial of due process are those stated above in the decisions in *Ochoa* and *Manson v. Brathwaite, supra*, 432 U.S. 98. (*Cook, supra*, at pp. 1352–1354; *People v. Chojnacky* (1973) 8 Cal.3d 759, 763–764.)

Also, the decision in *People v. Kennedy, supra*, 36 Cal.4th at page 608 settled that with respect to this issue, the appellate court reviews the record de novo.

---

[4] The photographic displays, exhibits 21 through 24, were ordered transmitted to

b. Davila's Six-Pack Photographic Display

On appeal, Davila contends that because he was depicted shirtless and the detective did nothing to mask the large tattoo on his neck or include other subjects who had similar tattoos, the photographic display was unduly suggestive. He also argues that the identification procedure was unduly suggestive because Ruben failed to mention tattoos and facial hair in his initial description of the gunman.

We independently reviewed the record. The circumstances do not suggest an identification procedure that was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The display that included Davila's photograph contained photographs of five other male youths who were Hispanic. The other youths depicted were generally of the same age and complexion as Davila. All the youths depicted generally resembled one another. That was all that was required for a fair identification procedure. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1208, 1214, 1217.)

At trial, Ruben testified that he failed to see any tattoos on the gunman during the shooting. Consequently, there was nothing unduly suggestive in failing to mask this unique feature in the photographic display. In preparing a display, the detective used the appropriate law enforcement software that is designed to automatically select booking photographs of other noninvolved persons who are similar in appearance to the person suspected of being the assailant. As the trial court observed, if anything, assuming that Davila was not the assailant, the tattoo would have served as a feature that would have immediately excluded Davila from consideration if he were not the gunman. Another youth in the display was depicted as similarly shirtless. However, all six photographs in the display were "head shots." In these "head shot[s]," the depiction without a shirt was not a feature that would have made any one person stand out from the other subjects depicted and rendered the display unfair.

---

this court. (Cal. Rules of Court, rule 8.224.)

II. Belated Discovery

Davila contends there was *Brady* error because the prosecutor only belatedly disclosed that he intended to grant two of the witnesses informal use immunity. He also claims that the trial court denied him due process when it denied his motions for a continuance and for a mistrial.

We disagree.

A. Background

This contention concerns only the murder.

During his opening statement, Davila's trial counsel mentioned that Michael and Henry were key prosecution witnesses. He also told the jury that he anticipated that at trial, Michael and Henry would identify Davila as the person who had stabbed Galindo. Trial counsel told the jury that two bystanders in the gas station also saw the "ruckus." He claimed that the bystanders would contradict Michael and Henry's testimony by claiming that the man wielding the knife was tall and thin, two tall and thin youths were Galindo's primary assailants, and that after the beating, these tall, thin youths ran to a car located in the gas station.

On the second day of trial, the prosecutor called Michael and Henry as witnesses and indicated at that juncture, that he intended to grant them informal use immunity.

The trial court held a hearing outside the presence of the jury. Trial counsel complained of *Brady* error, of belated discovery, and that he was entitled to the disclosure of the internal memorandum the prosecutor had in his possession. The internal memorandum had been used to obtain authorization from the prosecutor's superiors for the grants of use immunity. Trial counsel claimed that disclosure would aid cross-examination and that the internal memorandum might contain facts that he was entitled to as a matter of discovery.

Upon the prosecutor's claims of "work product" and confidentiality, the trial court ruled that appellant was not entitled to the internal memorandum insofar as it discussed the reasons for the grants of immunity. The trial court ascertained from the prosecutor that trial counsel had been given pretrial discovery of the underlying facts concerning the

murder that were disclosed in the internal memorandum. The trial court indicated that it had read the entire memorandum and that nothing contained therein would be of further assistance to Davila.

Nevertheless, trial counsel objected to proceeding until he had a copy of the internal memorandum. He acknowledged that he had read most of the document, but he wanted a copy to review with his notes over the weekend.

The prosecutor attempted to settle the issue by agreeing to turn over his original draft of the underlying facts of the murder that was integrated into the internal memorandum in support of urging authorization for the grants of immunity.

Trial counsel objected that the disclosure was untimely and that he would have changed the comments he made during opening statements had he known that the witnesses would be granted immunity. He made a conclusional claim of prejudice and asked for a mistrial. He complained that Michael, Henry, Arthur A., and Rene A. would be testifying and that one of them was identified by a witness as the knifeman.

The trial court denied the motion for a mistrial and what it characterized as a motion for a continuance. It commented that there was no denial of the right to prepare for cross-examination, trial counsel's opening statements did not mislead the jury, and trial counsel had obtained notice of the facts underlying the murder during pretrial discovery. There was no denial of the right to defend, nor was there surprise.

During the next recess, trial counsel cited cases concerning the *Brady* principle and complained that "it really took some of the wind out of my sails in my opening statement by preparing the jury for the force and effect of these four witnesses."

The trial court said that there was no surprise, cross-examining the witnesses concerning the grants of immunity would only assist the defense in demonstrating the witnesses lacked credibility, and there was no prejudice.

Michael and Henry testified with informal grants of use immunity.

B. The Analysis

On appeal, Davila makes a *Brady* claim and argues that the prosecutor failed to make a timely disclosure of the immunity agreements with Henry and Michael. By his

contention, appellant is not claiming that the disclosure was untimely pursuant to the relevant statutory provisions controlling discovery. (§ 1050 et seq.) Nor does he cite any authorities to meet the People's response that until the offer of immunity was disclosed to the witnesses, there were no inducements made to a witness that were required to be disclosed.

Pursuant to *Brady* and *Giglio v. United States* (1972) 405 U.S. 150, 152 (*Giglio*), the People have a duty, even in the absence of a request, to disclose all substantial material evidence favorable to an accused, whether such evidence relates directly to the question of guilt or to the credibility of a material witness. (*People v. Phillips* (1985) 41 Cal.3d 29, 46.) However, *Brady* does not create any pretrial discovery timelines so long as the ultimate disclosure is made before it is too late for the defendant to use the evidence. (*United States v. Scarborough* (10th Cir. 1997) 128 F.3d 1373, 1376; *United States v. Tarantino* (D.C. Cir. 1988) 846 F.2d 1384, 1416.) And, there is no *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. (*Kyles v. Whitely* (1995) 514 U.S. 419, 434; *People v. Salazar* (2005) 35 Cal.4th 1031, 1043.)

Davila does not assert that his cross-examination of the prosecution witnesses was affected and that with timely discovery, he could have produced a different impression of the witnesses's credibility. As the disclosure was made in time for appropriate and probing cross-examination, there is no *Brady* violation. (*United States v. Gonzalez-Montoya* (10th Cir. 1998) 161 F.3d 643, 649–650 [explaining that delayed disclosure of impeachment evidence did not violate *Brady/Giglio* because defendant had received the evidence in time to use it to impeach the witness]; *United States v. Nixon* (5th Cir. 1981) 634 F.2d 306, 311–313 [there is no *Brady* error where an immunity agreement was fully disclosed at trial, but the defense discovered the agreement only during cross-examination]; *United States v. Higgs* (3d Cir. 1983) 713 F.2d 39, 44 [where *Brady* material has impeachment value only, disclosure on the day the witness testifies satisfies due process].)

Also, there is no *Brady* violation as the factual information underlying the murder contained in the internal memorandum revealed only cumulative information already known to the defense. (See *United States v. Quintanilla* (8th Cir. 1994) 25 F.3d 694, 699; *United States v. Marashi* (9th Cir. 1990) 913 F.2d 724, 733 [the failure to disclose cumulative information does not amount to a *Brady* violation]; see *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 380–382 & fn. 19 [section 1054.6 provides that "core" work product is not discoverable]; *2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, 1390.)

Trial counsel did not ask for a continuance in this instance to prepare to meet the disclosure of the grants of immunity. He simply did not want to proceed at that point with Henry's trial testimony until he had in his possession a copy of the internal memorandum. When the prosecutor offered to give trial counsel a copy of the factual statement in the internal memorandum, in substance what trial counsel had already received, he had everything in his possession that he had requested. Thereafter, trial counsel was unable to offer to the trial court any further valid reason for not proceeding with trial. The trial court properly exercised its discretion by denying what the trial court characterized as a motion for a continuance. The trial court also denied the motion for a mistrial, and this latter motion was properly denied as Davila made no showing of prejudice and there was no *Brady/Giglio* violation.

III. The Requested Jury Instructions on Voluntary Intoxication

Davila asked the trial court to instruct on voluntary intoxication as it related to the murder with CALCRIM No. 625 and a proffered "pinpoint" instruction. On appeal, he contends that the trial court's denial of his requests violated his federal constitutional rights to due process and to have the jury determine every material issue presented by the evidence. The contention lacks merit.

A. Background

Davila's trial counsel submitted the following proposed jury instruction on voluntary intoxication: "Suzette Davila, defendant Davila's wife, testified. In reaching her lay opinion, she considered a statement made by Mr. Davila referring to the statements that Mr. Davila had been drinking. You may consider these statements only to evaluate Mrs. Davila's opinion."

Trial counsel also requested the trial court charge the jury with CALCRIM No. 625.[5]

At trial, Henry testified that about the time that it was getting dark, Davila smoked methamphetamine in their motel room with them for about 20 minutes.

Michael testified that Davila came to the motel room "to get high" and smoke methamphetamine. Davila remained in the motel room for about 20 minutes.

Davila's stepdaughter testified that earlier in the evening of January 6, 2007, Davila drank beer at her party. She said that he probably drank more than a six-pack.

Suzette testified that she did not know how much Davila drank at the party and said, "I could say more than three." Suzette then testified that she had two drinks and that Davila drank three Bud Lights. She explained that Davila "gets buzzed when he drinks," and that after the party, her daughter had given them a ride to the motel. Suzette said that she did not want Davila walking home when he was "buzzed" or "drunk" and that it was an hour or so after they returned to the motel when Suzette heard the paramedics' sirens. She claimed that Davila had stayed in the motel room with her as the

---

5 The pattern instruction CALCRIM No. 625 provides, as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation [,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ <insert other specific intent required in a homicide charge or other charged offense> .] [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

police and the ambulance arrived. She said that "[h]e was drinking, and [she] didn't want him outside."

With respect to the requests for jury instructions, the trial court indicated that it recalled that there was testimony about drinking. However, any testimony concerning intoxication was framed in the past tense. The trial court specifically recalled that Suzette had testified that Davila had only had three beers that evening. The trial court asked trial counsel whether it was mistaken. Trial counsel replied, "That's about right."

The trial court ruled that the evidence failed to support general instructions on voluntary intoxication, and it refused to give the requested special instruction.

B. The Relevant Legal Principles

"In a criminal case, a trial court must instruct on general principles of law relevant to the issues raised by the evidence, even absent a request for such instruction from the parties. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The obligation extends to instruction on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged. (*Ibid*.)" (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) "However, the 'substantial' evidence required to trigger the duty to instruct on such lesser offenses is not merely '*any* evidence . . . no matter how weak' (*People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12), but rather "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Cruz, supra*, at p. 664.)

Voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Visciotti* (1992) 2 Cal.4th 1, 56–57.) With murder, "[e]vidence of voluntary intoxication is admissible solely on the issue of . . . whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 22, subd. (b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1113.)

An intoxication instruction is not required where the evidence shows that a defendant ingested drugs or was drinking, unless the evidence also shows that the defendant *actually* became intoxicated to the point that he failed to form the requisite

intent. (*People v. Cain* (1995) 10 Cal.4th 1, 41; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1311–1312, questioned on an unrelated point in *People v. Guiuan* (1998) 18 Cal.4th 558, 560; *People v. Bandhauer* (1967) 66 Cal.2d 524, 528.)

An instruction on voluntary intoxication is a pinpoint instruction that must be given on request where there is sufficient evidence to support the defense theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120; see *People v. Rundle* (2008) 43 Cal.4th 76, 145.) A trial court is not required to give a pinpoint instruction if it is argumentative, merely duplicates other instructions, or is unsupported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.)

C. The Analysis

At trial, the evidence of drug or alcohol intoxication was at best tenuous. Davila did not testify to his state of mind at trial, and the record contains no other evidence that during the stabbing Davila was so intoxicated that he was unable to form the specific intent necessary to commit willful, deliberate, and premeditated murder. Therefore, the trial court was not required to give the requested instruction on voluntary intoxication.

With respect to the defense's special "pinpoint" instruction, Suzette did not testify to any statements Davila made to her concerning his drinking or that established intoxication. Further, the proffered instruction was an improper pinpoint instruction because it did not focus on the defense's legal theory and amounted to an improper attempt to highlight particular defense evidence. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 172–174.) The trial court gave a general instruction on how the jury should consider lay opinion testimony, and thus, the special defense instruction was unnecessary. The trial court did not err, and Davila was not denied his rights to due process and to have the jury determine every material issue presented by the evidence. (*People v. Romero* (2008) 44 Cal.4th 386, 402–403; see *People v. Dominguez* (2006) 39 Cal.4th 1141, 1160.)

IV. The Gang Enhancement

Juarez contends that the evidence is insufficient to support the gang enhancement. The contention fails to persuade us.

A. The Standard of Review

In determining the sufficiency of the evidence to support a jury's true finding, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) '[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)" (*People v. Leon* (2008) 161 Cal.4th 149, 156–157.)

B. The Elements of a Gang Enhancement

To obtain a true finding on an allegation of a criminal street gang enhancement, the People must prove the crime at issue was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) Also, they must prove that a gang is a "criminal street gang" that has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and that it has engaged in such a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e) & (f); *People v. Gardeley* (1996) 14 Cal.4th 605, 617; accord, *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319–320; *People v. Loeun* (1997) 17 Cal.4th 1, 8–10.)

C. The Analysis

Juarez is not challenging the foundational aspects of the gang enhancement, i.e., that Juarez's and Davila's gangs qualified as a "criminal street gang[s]." (See § 186.22, subds. (e) & (f).) He is concerned only with the sufficiency of the evidence supporting the elements of whether (1) the crime was committed in association with or for the benefit of the gang and (2) he had the specific intent to promote, further, or assist in any criminal conduct by gang members.

The contention amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the jury. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) The expert gang opinion in this case was rooted in the facts of the case. The detectives testified to the territorial boundaries of Juarez's and Davila's gangs. There was evidence that Ruben lived within the Bassett gang's territorial boundaries and that the Bassett gang was a bitter rival of the Flores and Puente gangs. Detective Guerrero testified that during the last several years, the Flores and Puente gangs, former rivals, were living and associating together. One of the primary activities of the Puente gang was committing assaults on its rival, the Bassett gang. The Puente gang also committed violence on ordinary citizens. And, currently, the officers were hearing rumors that the Puente gang was affiliating with other gangs in order to make a concerted attack on its primary rival, the Bassett gang.

Also, Ruben's nonaffiliation with a gang did not indicate there was no gang activity here. Ruben testified that prior to the shooting, Davila yelled out, "Hey ese. Where are you from?" This is a well known gang challenge, which supports a reasonable inference that the shooting was gang-motivated. (See *People v. Reyes* (2008) 159 Cal.App.4th 214, 221 (rev. den.); *People v. Roquemore* (2005) 131 Cal.App.4th 11, 17.) During the shooting, Davila did not have to shout out his gang name to advertise the shooting was a gang effort at community intimidation. When Davila stuck his head out of the passenger window, his prominent EMF tattoos would have been plainly visible to anyone who realized their significance, which Ruben apparently did not.

The above evidence provided a sufficient factual basis for the prosecutor to elicit from the detective by a hypothetical question the ultimate fact of whether the shooting was committed for the benefit of, at the direction of, or in association with Juarez's respective gangs. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946–947; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) The expert's testimony on the ultimate issue was necessary as the jury would not otherwise have known that Juarez's and Davila's different gang affiliations militated in part against the existence of circumstances proving a gang enhancement. The jury also would not have known that currently, the Puente and

the Flores gangs had become allied in an effort to attack their rival, the Bassett gang. It was also necessary to the People's case in this instance to explain to the jury the underlying facts that indicated that the shooting fit the profile of gang activity. (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 507–509; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224.)

The substance of the experts' testimony was given through properly admissible responses to hypothetical questions. (*People v. Ward* (2005) 36 Cal.4th 186, 210.) At no point was Detective Guerrero asked to speculate specifically about Juarez's and Davila's state of mind during the shooting. (See *People v. Gonzalez, supra*, 38 Cal.4th at pp. 946–947 & fn. 3.) The circumstantial evidence concerning specific intent was properly admissible evidence involving several known characteristics of the Flores or Puente gangs, or, it was expert opinion evidence couched in terms of gang rivalries, gang habits, gang psychology, and gang culture generally. (*Ibid*.) The expert opinion evidence fell well within the parameters delineating admissible gang evidence. (*Id.* at pp. 946–947 & fn. 3; *People v. Ward*, *supra*, 36 Cal.4th at pp. 209–210; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657–658; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197.)

The evidence was sufficient to support the jury's finding on the gang enhancement. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 978, disapproved on other grounds in *People v. Gardeley*, *supra*, 14 Cal.4th at p. 624.)

Juarez argues that even if the crimes were committed for the benefit of the gang, he lacked the requisite "specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Relying on the majority opinion in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, Juarez asserts that the statute requires a showing of intent to promote the gang's criminal activity beyond the charged crime. In *Garcia*, the Ninth Circuit found insufficient evidence of specific intent to promote, further, or assist in other criminal conduct by the defendant's gang. This court agrees with the decision in *People v. Hill* (2006) 142 Cal.App.4th 770. What is required by the plain language of section 186.22 is a showing of a specific intent to promote, further, or assist in "any criminal conduct by gang members," rather than a showing of "*other*

criminal conduct." (§ 186.22, subd. (b)(1); *Hill, supra*, at pp. 773–774; accord *People v. Romero* (2006) 140 Cal.App.4th 15, 19–20.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, Acting P. J.

DOI TODD

_____, J.

CHAVEZ